REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 3 OF 2004

JAMES OCHOM ODIONYI……..……..APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(From the original conviction and sentence in criminal case No.1613 of 2001 of the Senior Resident Magistrate's Court at Busia by Hon. Betty Maloba – Senior Resident Magistrate)

JUDGMENT

1. **JAMES OCHOM ODIONYI**, the appellant, was convicted in three counts for the offence of robbery contrary to section 296(2) of the Penal Code.

2. The particulars of the offences were that on the night of 18th and 19th November 2001 at **ADUNGOSI** area in **TESO** District of Western Province, while armed with AK 47 assault rifle and clubs, jointly with others not before court robbed **CHARLES OPEMI OYALA** of Kshs. 5,205/= and immediately after the time of such robbery, used violence to the said **CHARLES OPEMI OYALA**. On the same date and place similarly armed jointly with others not before court robbed **GEORGE OTENGE OPILI** of Kshs. 900/=, one T-shirt, one bicycle and one wrist watch all valued at Kshs. 5350/= and immediately after the time of such robbery, used violence to the said **GEORGE OTENGE OPILI**. Again on the same date and place similarly armed jointly with others not before court robbed **MOSES CHAPA MANYURU** of two bicycles, one T-shirt, one bicycle and one wrist watch all valued at Kshs. 8,600/= and immediately after the time of such robbery, used violence to the said **MOSES CHAPA MANYURU** .

3. The appellant was sentenced to suffer death as prescribed by the law. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised six grounds of appeal which I have summarized as follows:

a) That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence of identification.

b) That the learned trial magistrate erred in law and in fact by convicting him without some material witnesses being called to testify.

c) That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.

5. The state opposed the appeal through Mr. Omayo, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

On 18th November 2001 at about 8 pm some robbers attacked Charles Opemi Oyalo and George Opili robbed them and walked with them into several homes where they robbed other people. The robbers were armed with a rifle and clubs. Some of the robbers were identified.

7. The appellant denied involvement in the offences.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

9. The appellant contended that he was not identified as one of the perpetrators of the robberies. The offences were committed at night. I will therefore interrogate the evidence on record to establish whether the purported identification was proper. In doing so, I will be guided by the

celebrated decision of Lord Widgery in the case of **R. vs. TURNBULL & OTHERS [1976] 3 ALL ER 549** where he observed as follows:

> ***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.***
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> ***Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.***

10. The evidence of **Charles Opemi Oyaro (PW1)** is that as he was walking home in company of Rose and George Opili (PW3), some robbers came from behind and attacked them. He was able to recognize the appellant whom he said was armed with a rifle. When Rose flashed her spotlight at him he hit her. Later Rose and a child were released but the robbers walked with them until at about 4 am. At one point they discussed to kill him for he had recognized them but apparently they discarded the idea when they saw a man whom they pounced on. He also testified to have recognized the appellant when a spotlight was directed at a teacher who was being attacked by the robbers. When the other robbers entered another home, the appellant was left guarding them.

11. Like PW1, **George Opili (PW2)** testified that there was bright moonlight which assisted him in identifying the appellant. When Rose flashed her spotlight, he was able to see and recognize him. He said the appellant was his neighbour and that he used to see him on a daily basis.

12. The evidence by this two witnesses is that of recognition. They also testified that other than physical recognition, the appellant and another were recognized by their voice. During trial the appellant and his co-accused were represented by Mr. Ipapu, learned counsel. The record shows that he never challenged the evidence of recognition. I therefore find that the duration the witnesses were captives of the robbers moving from one house to the other, was adequate for a positive recognition of the appellant. This was from about 8pm to about 4am. There was moonlight and the spotlights that aided them to see and recognize him. My finding so is bolstered by the evidence of **PW1** who testified that at the time of reporting, he gave the identity of the appellant to the police. Again this was unchallenged. The appellant in his defence said that he knew **Charles Opemi Oyaro (PW1)** and that they had never disagreed. This is further confirmation that the recognition was flawless.

13. Though the appellant complained that some material witnesses were not called, he did not identify any of them so that I could make a finding whether these witnesses were material or not and the effect of the failure to call them. This ground is accordingly dismissed for want of merits.

14. The appellant contended that the charge sheet was defective for the failurure to include his aliases, the occurrence book number was not indicated on the charge sheet and that the OCS did not sign the charge sheet. This was contained in his submissions received in court on 10th May 2017. These were new matters that did not form part of his grounds of appeal. He cannot be allowed to introduce new grounds in his submissions.

15. A charge sheet contains the charge or charges against an accused person. If the charge or charges therein communicates to the accused and informs him of the accusations against him, the rest are details of form and no trial can be vitiated for want of form.

16. It is worth noting that the appellant has raised in his submissions issues that he had not raised in his grounds of appeal and which was ordered to be heard again. This is tantamount to amending his appeal without the leave of the court. Submissions are meant to support the grounds of appeal, but are not grounds in themselves.

17. The appellant gave the defense of alibi. In **KIARIE V. R. (1984) KLR 739, 740** it was held:

> ***An alibi raise a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.***

In the instant case the alibi defence of the appellant was displaced by the overwhelming evidence tendered by the prosecution.

18. After a careful analysis of the evidence on record, I find that I cannot reach a different conclusion from the one arrived at by the learned trial magistrate. There are two areas I wish to point out. In the course of sentencing, the trial magistrate erroneously purported to sentence the appellant in count four in which he had been acquitted instead of the 5th count. This was however not prejudicial to the appellant. The defect is curable under section 382 of the Criminal Procedure Code. Secondly, after the convicting the appellant in more than one count where the penalty is death sentence, the right procedure would have been to sentence him in count 1while the sentence in the other counts remained in abeyance. Again no prejudice was occasioned. I therefore set aside the sentences in counts 2 and 5 and order that the same to remain in abeyance.

19. The upshot of the foregoing is that the appeal is dismissed.

DELIVERED and **SIGNED** at **BUSIA** this **15th day** of **March, 2018**

KIARIE WAWERU KIARIE

JUDGE